

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH B. PRICE,

Defendant-Appellant.

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UNPUBLISHED

August 14, 2003

No. 239342

Wayne Circuit Court

LC No. 01-004055-01

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (victim under thirteen) (CSC-I), MCL 750.520b(1)(a). Defendant was sentenced to three concurrent terms of twenty-five to fifty years' imprisonment.<sup>1</sup> We affirm.

I. Basic Facts

The victim is defendant's son. At a joint trial, the victim testified that when he was between six and eight years old when defendant and his mother, Jean Roach, sexually abused him. The victim testified that defendant engaged in anal intercourse with him multiple times. The victim further testified that Roach, although not present during defendant's abusive acts, once manually stimulated the victim's penis when she was alone with the victim. The jury found defendant guilty of three counts of CSC-I and Roach was convicted of second-degree criminal sexual conduct (victim under thirteen) (CSC-II), MCL 750.520c(1)(a)<sup>2</sup>.

II. Therapy Records

Defendant first argues that the trial court improperly denied his motion to conduct an in camera review of the victim's therapy records. We disagree. A trial court's decision with respect to an in camera inspection is reviewed for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 682; 521 NW2d 557 (1994). An abuse of discretion exists only when an unprejudiced

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<sup>1</sup> This case was submitted with *People v Roach*, Docket No. 239341.

<sup>2</sup> We affirmed Roach's conviction and sentence in *People v Roach*, Docket No. 239341.

person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). Even though each party has a right to discovery under MCR 6.201, a trial court's decision to order an in camera review of privileged records remains discretionary. *People v Laws*, 218 Mich App 447, 454-455; 554 NW2d 586 (1996).

Before the option of an in camera inspection is exercised, a defendant must show "a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense." *Stanaway, supra* at 676-677. "The defendant's generalized assertion of a need to attack the credibility of his accuser [does] not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the various statutory privileges." *Id.* at 650. The touchstone of materiality is whether there is a reasonable probability that the evidence, if not suppressed, will lead to a different result at trial. *People v Fink*, 456 Mich 449, 455; 574 NW2d 28 (1998).

In the instant case, defendant failed to meet his burden of establishing the need for an in camera review of the victim's counseling records. Defendant has not demonstrated that there was a reasonable probability that the records contained material information necessary to his defense. *Stanaway, supra* at 676-677. A discrepancy between social worker's report and the victim's statement concerning the address where the sexual assaults occurred was not a demonstrable fact that could serve as the basis for defendant's belief that the victim's records contained inconsistent statements. Defendant's assertion that the records might contain evidence useful for impeaching the victim was a generalized one, and as such, insufficient to support his request for an in camera review. *Id.* at 681. Because defendant failed to satisfy his burden, we conclude that the trial court did not abuse its discretion in denying defendant's motion for an in camera review.

### III. MRE 404(b)

Next, defendant contends that the trial court erred in admitting other acts evidence pursuant to MRE 404(b) because the evidence was only offered to impugn defendant's character and bolster the victim's testimony, and the unfair prejudice of the admission outweighed any probative value. We again disagree. This Court reviews a trial court's ruling regarding the admissibility of other acts evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

MRE 404(b) provides, in relevant part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be logically relevant to a matter at issue at trial, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the respondent's character to show his propensity to commit the offense. *People v Crawford*, 458 Mich 376, 391; 397; 582 NW2d 785 (1998), quoting *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

Here, the other acts evidence was not introduced for the purpose of showing defendant's criminal propensity, but rather, to show that the victim was subject to continuous acts of sexual abuse by defendant over an extended period of time. Evidence of a defendant's assaultive behavior is admissible to establish the common scheme, plan, or system of a defendant in perpetuating a particular type of physical assault. See *Hine, supra* at 244. Nor was the probative value of the evidence substantially outweighed by the danger of unfair prejudice. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. The evidence of defendant's continuous sexual assaults against the victim was not "marginally probative." It was important to the jury's credibility determination regarding the charged acts.

Finally, our review of the record reveals the trial court instructed the jury that it was only to consider the evidence of defendant's uncharged acts for the limited purpose of judging the believability of the testimony regarding acts for which defendant was on trial. Thus, any possibility of undue prejudice was avoided by the trial court's limiting instruction to the jury. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). The trial court did not abuse its discretion in admitting the other acts evidence pursuant to MRE 404(b).

Affirmed.

/s/ Kathleen Jansen

/s/ Janet T. Neff

/s/ Kirsten Frank Kelly